

The Failure of Divorce Reform

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Few fields of the law are more in need of reform than divorce. The reasons have been obvious for years. Lawyers are basically realists, who prefer to apply legal principles to ascertainable and verifiable facts. A modern lawyer has an abhorrence for the legal fictions and the pious perjuries which were so dear to the heart of the medievalist. But there is no area of the law in which fact and fiction, reality and myth, truth and perjury, are so interwoven as in the operations of the present laws of divorce. Moreover, lawyers as a class take the canons of legal ethics seriously. They prefer to practice as honorable men. Yet no branch of the law throws more of a strain upon a lawyer's conscience or tends as much to befuddle the canons of ethics as the practice of divorce law.

The very premises on which divorce laws are based put a premium on make believe, pretence and perjury, and convert matrimonial litigation into a never-never land of unreality and fiction. Basic in divorce law is the concept that the legislature can specify particular grounds which, if present in a matrimonial relationship, make marital life so intolerable that a dissolution of marriage through divorce is necessary. This attitude of the law is derived from the procedure of the ecclesiastical courts of England which permitted only two grounds, physical cruelty and adultery, as a basis for a limited divorce from bed and board, which permitted the parties to live separate and apart, but did not give them the right to remarry. There are, unfortunately, many different varieties of behavior besides physical cruelty and adultery which may wreck a marriage. Divorce statutes have come to be known as "strict" or "liberal" depending upon the number of grounds they provide which would justify the dissolution of a marriage. However, it is impossible to categorize all the varieties of matrimonial friction and individual malevolence which would justify divorce in any single divorce statute. It is obvious that under restrictive divorce statutes listing few grounds for divorce, large areas of misbehavior are present which may make marital life intolerable, but which do not legally justify a divorce. This aspect of the law is epitomized in a recent New York case in which a divorce action was brought by the wife because of the sodomy of the husband which had resulted in his being sentenced to state prison for a long term. The New York statute provides only one ground for divorce, namely adultery. As a technical matter, sodomy is not adultery. The wife was denied a divorce in this case as a matter

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of law.¹ Yet it is apparent that homosexuality and sodomy on the part of a husband can wreck a marriage far more effectively than an occasional escapade with another woman.

Where the husband and wife desire their matrimonial freedom, and the particular misbehavior which has marred their marriage is not listed in the statute as one of the grounds for divorce, then the pressure to manufacture the legal grounds becomes well nigh irresistible. Perjury is a small price to pay for matrimonial freedom. Here is the basic reason for the staged bedroom dramas which are such a characteristic feature of New York divorce litigation. This is illustrated by Justice Bonyng's remark in *Reed v. Littleton*,² "Has not my good brother overlooked the fact that a certain amount of naivete is an essential adjunct to the judicial office? Does not the Supreme court grind out thousands of divorces annually upon the stereotyped sin of the same big blonde attired in the same black silk pajamas? Is not access to the chamber of love quite uniformly obtained by announcing that it is a maid bringing towels or a messenger boy with an urgent telegram?"

The pressure to find a means of dissolving marriages which are not listed in the statute is responsible for the tremendous growth of annulments as a substitute for divorce in New York, which has caused New York to be designated as a "poor man's Reno." Annulment is a traditional technique for dissolving marriage because of defects or impediments occurring at the inception of the marriage contract. In New York there can be little doubt that many of the defects or impediments on which annulment actions are based are conjured up for the occasion as a device to secure matrimonial freedom. They are normally discovered *after* a husband and wife find they are incompatible and go to a lawyer to ascertain how they may dissolve the chains that bind them. Referee Lapham's comments in *Richardson v. Richardson*³ indicate the extent to which perjury is resorted to in annulment proceedings in order to achieve the goal of marital freedom:

An analysis of the unending procession of annulment actions on the calendars of our courts, gives rise to the conviction that many persons who would not stoop to frame a false charge of adultery fall prey to the temptation of magnifying pre-marital assurances and post-marital words and acts, to satisfy the technical requirements of the law, thus shielding themselves from the necessity of disclosing the real cause of the rift. . . . It is the task of sifting the sincere and truthful from the sham and fabricated, that taxes the analytical powers of the Court.⁴

¹ *Cohen v. Cohen*, 103 N.Y.S. 2d 426 (1951).

² 159 Misc. 853, 289 N.Y.S. 798 (1936).

³ 103 N.Y.S. 2d 219 (1951).

⁴ *Id.* at 222.

Other aspects of our divorce laws are also completely out of touch with the realities of modern divorce litigation. There is the doctrine of recrimination in divorce law, which would permit a divorce to be granted only to an innocent and injured party. Interpreted literally, this would mean a denial of divorce in most cases since normally both parties contribute to matrimonial conflict and discord. This requirement of divorce law is ignored in actual practice, since most divorce cases are uncontested, and there is no defendant available to tell a court about domestic woes he has suffered at the hands of the plaintiff. Similarly, there is a rigorous prohibition of collusion and connivance in divorce law. Divorces cannot be had because both parties want them and cooperate in obtaining them. But in modern divorce litigation, when a husband and wife have decided to go their separate ways and have settled their conflicts over property, alimony, custody of children, etc., a divorce proceeding is brought with the consent of *both* parties. The collusive divorce is the rule rather than the exception. This was noted by a writer who stated:

Legal prohibitions and judicial declarations to the contrary, . . . a divorce may in reality be expeditiously obtained simply if both spouses mutually agree to do so and if they are willing to pay the toll. . . . No satisfactory method of eliminating collusion [in divorce cases] has been devised. But there is a "persistent belief as to the prevalence of the practice with legislators, judges, official referees, court clerks, lawyers, litigants and writers, all swelling the flood of opinion with their testimony." Although England and the United States have not adopted the principle of mutual consent divorces, such divorces "are through collusion a fact in the United States and England."⁵

The above does not exhaust the catalogue of pretence and make believe which is part and parcel of the administration of our divorce laws. Other facets may be noted. There is the daily spectacle of courts announcing on the one hand that the State has a vital interest in the maintenance and stability of the marital relationship and on the other dissolving marriages upon the basis of trivial incidents of what is euphemistically called mental cruelty. There is the phenomenon of judges in the so-called "quickie" divorce jurisdictions solemnly declaring that domicile, evidenced by the intention to establish a permanent home in the State, is a prerequisite to jurisdiction in any divorce proceeding. Nevertheless that does not prevent them from permitting their courts to be used as an adjunct of the tourist traffic. More than one writer has obtained the best information about the divorce law of these states, not from the bar associations, but from the Chambers of Com-

⁵ 36 COL. L. REV. 1121, 1127 (1936).

merce.⁶ The result is that while lip service is paid to domicile as the basis of divorce jurisdiction, decrees are handed down in favor of plaintiffs who have come into the state solely for the purpose of procuring a divorce, and expect to leave as soon as it is granted.

Any well informed lawyer is familiar with the facts above mentioned. But while writers, judges and observers deplore such conditions in our divorce courts, efforts to bring about material changes have largely resulted in failure.

This failure becomes apparent when the history of divorce law reform in this country is studied. As early as 1879, the American Bar Association instructed its Committee on Jurisprudence and Law Reform to recommend such changes as they deemed expedient for bringing about more uniformity in the laws of marriage and divorce among the several states. This hope for uniform laws was echoed again by President Theodore Roosevelt a quarter of a century later in his message to Congress in 1905.

There is a widespread conviction that the divorce laws are dangerously lax and indifferently administered in some of the states, resulting in a diminishing regard for the sanctity of the marriage relation.

The hope is entertained that co-operation amongst the several states can be secured to the end that there may be enacted on the subject of marriage and divorce, uniform laws containing all possible safeguards for the security of the family.

This expression of hope by President Roosevelt took concrete form when the Pennsylvania legislature passed a statute authorizing its governor to call a national divorce congress to consider what steps could be taken to abate the evil of increasing divorces in the United States. This Congress was called at the instance of Governor Pennypacker of Pennsylvania and met in Washington in 1906. All states sent delegates to this Congress except Mississippi, Nevada and South Carolina. The draft of a statute regulating divorce, arising out of the deliberations of this Congress, was a moderate and restrained document. It provided for both absolute and limited divorces. It insisted upon bona fide residence or domicile as a prerequisite for divorce. It specified the causes for annulment as well as divorce. The draft act provided only six grounds for absolute divorce, namely, adultery, bigamy, extreme cruelty, conviction of crime in certain cases, wilful desertion for two years, and habitual drunkenness for a period of two years. No divorce could be granted except upon affirmative proof aside from any admissions on the part of the respondent, and fraud or collusion in obtaining a divorce were severely condemned.

⁶ See notably, 17 MINN. L. REV. 638 (1932-3); Pollitt, *Quick Divorce*, 39 KY. L. J. 288, 293 (1950-51).

The draft statute of the divorce congress was recommended to the various States by the Commissioners on Uniform State Laws. However, only New Jersey, Delaware, and Wisconsin adopted the principles of the draft act. Parts of the proposed Statute were adopted in other states, but the effort to make this statute the basic act on divorce throughout the country and thus to unify the divorce laws, resulted in failure. It was not even adopted in Pennsylvania, whose legislature was instrumental in calling the Congress.

The divorce congress, although it was optimistic about the possibility of unifying divorce laws through action of state legislatures, was extremely skeptical as to the possibility of achieving divorce reform through Federal legislation. Accordingly, it passed a resolution stating that it was the intent of the Congress that no Federal divorce law was feasible, and that all efforts to secure the passage of a Constitutional amendment, a necessary prerequisite, would be futile. Despite this skepticism, many resolutions were introduced into Congress providing for an amendment to the Constitution which would give Congress power "to make laws which shall be uniform throughout the United States on marriage and divorce."⁷ Senator Capper in particular sought earnestly to get Congress to pass this and similar resolutions, because he felt that it was the best way to lift the standards of our marriage laws as well as to correct the looseness and laxity in divorce administration, particularly in the migratory divorce jurisdictions.⁸ The various resolutions to amend the Federal constitution, however, never even came to a vote in Congress. Thus any attempt to eliminate the present evils of divorce through a transfer of jurisdiction over marriage and divorce from the States to the Federal Government has been completely stymied.

One of the basic reasons for a Federal statute on divorce is the necessity of eliminating the evils which result from migratory divorces obtained in jurisdictions where neither the plaintiff nor the defendant reside or are domiciled. These evils were succinctly summarized by Mr. Justice Jackson in his dissent in *Estin v. Estin*,⁹ "If there is one thing that the people are entitled to expect from lawmakers, it is rules of law, that will enable individuals to tell whether they are married and if so to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they effect fundamental rights and relationships such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are

⁷ See for example S. J. Res. 5, 68th Cong., 1st Sess.

⁸ See for example *Hearings before Senate Sub-Committee on Judiciary on S.J. Res. 5*, 68th Cong., 1st Sess.

⁹ 334 U.S. 541, 553 (1948).

law abiding persons or criminals. In a society as mobile as ours, such uncertainties affect a large number of people and create a social problem of some magnitude."

These evils are particularly apparent in States like New York with technically strict divorce laws, whose citizens take their domestic woes in large numbers to "quickie" divorce jurisdictions. But the extent of the evils resulting from migratory divorce has not, over the years, moved Congress to take favorable action on the Constitutional Amendment which would pave the way for the exercise by the Federal courts of power over divorce.

Since a federal divorce law is not an immediate possibility, the attempt has been made to meet the evils of migratory divorce on a state level. The National Conference of Commissioners on Uniform State Laws has drafted and recommended for adoption by the States a uniform divorce recognition act, prescribing principles which would entitle out-of-state divorces to recognition in the home state. However, this statute has been adopted in only seven states.

Individual states have from time to time amended their divorce statutes so as to make them more realistic instruments for dealing with the incidents of matrimonial strife. South Carolina, for example, which for many years was the only state not permitting absolute divorce on any grounds, has recently struck from its Constitution the prohibition against such divorces. Its Constitution now provides for absolute divorce on the grounds of adultery, desertion, physical cruelty and habitual drunkenness.¹⁰ A number of states such as Arkansas, Louisiana and North Carolina, have made it possible to terminate marriages through divorce by the simple act of the parties living separate and apart for the number of years specified. New Mexico has accepted the fact that the inability of the two parties to get along and make their marriage work is the basic reason for the application for divorce. This State has accordingly amended its statutes and made temperamental incompatibility a ground for divorce.¹¹

But the path of divorce reformers through state legislatures is a very uneven one. Perhaps the most striking failure of divorce reform is in New York, where a bill proposed by the Bar Association of the City of New York, which would have added five new grounds for absolute divorce (besides adultery which is presently the sole ground) was introduced at a number of sessions of the State Legislature and never even got out of Committee. The Divorce Reform Committee of the Association of the Bar has been reduced to advocating a bill which would provide for a Commission to study the administration of divorce

¹⁰ Act No. 95 of Acts and Joint Resolutions, 1949.

¹¹ Sec. 25-701, N.M.S. 1941 anno.; see also *Poteet v. Poteet*, 45 N.M. 214, 114 P. 2d 91 (1941).

laws in New York. Such a study could only bring to light the familiar evils already apparent to everybody.

There are a number of basic reasons for the failure of divorce reform to make better progress in this country. In the first place, the divorce reformer must attempt to steer between two completely irreconcilable positions. There are those who believe that the family unit is already irretrievably broken when an application for divorce is made to a public authority. Where a divorce decree is sought by *both* parties to a marriage, these persons believe that it should be granted without reference to traditional rules as to grounds for divorce, who was at fault in the disruption of the marriage, collusion, recrimination, etc. These individuals urge in effect that the law adopt the Roman law view of divorce by consent of the parties. On the other hand, there are many who like the Catholics and some Episcopalians believe that the whole concept of dissolving a valid marriage through divorce is evil, and that the only reform possible in our divorce laws is to abolish divorce altogether, permitting only a limited separation from bed and board in appropriate cases.

The divorce reformer, in attempting to formulate uniform divorce laws for the country, has tried to steer a middle course between these extremes and provide a traditional statute with grounds for divorce, which are approved in a majority of the States. This approach has not satisfied those who feel that some adaptation of the Roman law of divorce, is the way to deal with our divorce problems. Nor has it satisfied persons in States with liberal divorce laws, which provide for numerous grounds for divorce. It is futile, for example, to expect that the authorities in the migratory divorce jurisdictions will give up their peculiar approach to divorce in the interests of national uniformity. Divorce in these states is a major source of revenue which will not be surrendered except under the compulsion of Federal law. There is no sign of such compulsion. Indeed, the Supreme Court, which might serve as an instrument to break up the migratory divorce racket, has in effect largely given the racket its blessing in the *Sherer* and *Coe* cases¹² and in its overruling of *Haddock v. Haddock*.¹³

The proposal to extend the grounds for divorce in states with relatively strict divorce laws has run into the unremitting opposition of those who believe that no earthly power can dissolve a marriage which has once been validly entered into. That there is absolutely no room for compromise on this question of making divorce easier is apparent from the comments of a Catholic lawyer, writing in the *Loyola Law Review*:¹⁴

¹² 334 U.S. 343 (1947).

¹³ 201 U.S. 562 (1906), *overruled in*, *Williams v. North Carolina*, 317 U.S. 287 (1942).

¹⁴ 5 LOYOLA L. REV. 159, 160, 161 (1949-50).

Legislation legalizing divorce is *malum in se*, and when the civil courts pronounce a decree of divorce not only do they act illicitly, their decree effectuates no real dissolution of the marriage bond. . . . It is obvious that the divorce laws of our modern states are evil in themselves and similarly the application of these laws through the courts is also evil . . . since they cannot really accomplish what the law attempts, namely dissolve the bond in reality.

There are large numbers of persons in every state who have the same religious convictions about divorce as this writer. Obviously such individuals will unalterably oppose any attempt to deal with the scandals arising from divorce law administration by making divorce easier.

The second major factor in the failure of divorce reform is the fact that the traditional approach to divorce is bankrupt and no divorce statute drawn on traditional lines can be satisfactory. The traditional approach to divorce fails to come to grips with the real issues involved in the breakup of marriages. Legal fault which justifies a divorce, no matter how that fault is phrased in a statute becomes merely a convention, a legal formula which must be fulfilled before marital freedom is obtained. The means whereby the evidence is obtained depends upon the squeamishness of the parties and their attorneys. It may have little relevance to the respective faults of the husband and wife or to the basic reasons for wanting a divorce. Nowhere in the traditional approach is there room for the question of what actually brought the husband and wife to their present bad position. How does it happen that a marriage begun with such high hopes has ended in disillusion and failure? What qualities of personality, what social and economic factors contributed to the breakdown of the family unit? Is it possible to solve the difficulties existing between the husband and wife by means short of divorce? The traditional approach to divorce cannot provide answers to such questions. Although it is theoretically based on an adversary proceeding, in nine out of ten cases only one party to the marriage appears. Even if both parties were to appear, the divorce courts simply do not have the machinery nor the facilities to produce the objective independent data on what is really troubling a husband and wife, and what is really causing the disruption of the marriage. Our divorce courts and our divorce proceedings have in large measure ignored the many disciplines such as family case work, psychiatry, marriage counselling and probation that have been dealing with problems of family disorganization and marital conflict for years.¹⁵

Only in recent years has the ineptitude of the traditional approach to divorce been realized. Under the inspiring leadership of Judge Paul

¹⁵ See PLOSCOWE, *SEX AND THE LAW* 58.

Alexander, chairman of the American Bar Association Committee on Divorce and Marriage Laws, a start has been made in the direction of modifying the law so that it will provide a diagnostic and therapeutic approach to divorce which is absolutely necessary if divorce courts are to serve the fundamental interest of the law in the conservation of family life. As Judge Alexander puts it:

The American Bar Association Committee proposes to transform the divorce court from a morgue into a hospital, to handle our ailing marriages and delinquent spouses much as we handle delinquent children. . . . Instead of looking only at the guilt of the defendant, it proposes to examine the whole marriage, endeavor to discover the basic causative factors, seek to rectify them, enlisting the aid of other sciences and disciplines and of all available community resources.¹⁶

A statute embodying the therapeutic and diagnostic approach to divorce suggested by Judge Alexander remains to be drawn. When formulated, it is to be hoped that it will be easier to enact than statutes based on a traditional approach to divorce. A therapeutic and diagnostic statute would unquestionably serve much better the law's interest in the maintenance and stability of the family.

Finally divorce reform has failed because it has been concerned far too much with the techniques of dissolving marriages and not sufficiently with the methods of entering the marriage relationship. Lax marriage laws are one of the major sources of marital discord and marital disruption. So long as it is possible for men and women and boys and girls to run off and get married on the spur of the moment without reflection or deliberation, with a minimum of formalities or no formalities at all beyond production of a license fee, there will inevitably be great pressure upon the divorce laws to dissolve the hasty marriages when the parties discover they are seriously mismatched. This is apparent from a recent study of divorce in Hamilton County, Tennessee. The large number of divorces in this county, states the report, "is probably attributable to a large extent to the ease with which marriages are contracted over the state line in Georgia, particularly in Rossville. . . . Because of the utter lack of restrictions in procuring licenses . . . in Georgia the Justice of the Peace was enabled to issue the licenses and likewise to perform the ceremony. The only requirements for marriage in Georgia were for the couple to want to marry, a trip to a justice of the peace and a fee of five dollars. A great many of the marriages so performed resulted in divorces filed in Hamilton County."¹⁷

Judge Alexander has stated that of the 12,000 divorce cases coming before him, one out of three followed what he called a migratory

¹⁶ 1950 A.B.A.J. 169-170. See also 19 KAN. B. J. 322 (1950-1951).

¹⁷ 19 TENN. L. REV. 932-3 (1947).

marriage performed in a place where neither party lived and where license formalities are lax.¹⁸

The elimination of child marriages, the insistence upon parental consent in the case of the marriage of minors, the prevention of the marriage of the mentally deficient, the mentally unfit and the physically diseased, the elimination of hasty and clandestine marriages through the provision of adequate waiting periods between marriage license applications and marriage ceremonies, the insistence upon residence of one of the parties as a requirement for the issuance of the marriage license; these are some of the changes in the marriage laws of the various states which would materially cut down the extent to which men and women resort to divorce courts. Lax marriage laws and procedures are one of the principal factors in the demand for the dissolution of marriage through divorce. A divorce reformer who has sincerely at heart the interest of the state in the conservation of marriage, must therefore concern himself with improving techniques and methods of entering the marriage relationship, as well as the techniques and methods whereby it is dissolved.

¹⁸ See 19 KAN. B. J. 329 (1950-51).